No. 3923

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLEM ROGERS,
Appellant,

vs.

BRIX BROS. LOGGING COMPANY,
a Corporation,
Appellee.

Brief for the Appellant

Upon Appeal from the United States District Court for the District of Oregon.

ERSKINE WOOD,
M. M. MATTHIESSEN,
1310 Yeon Building,
Portland, Oregon,
Attorneys for Appellant.

OMAR C. SPENCER,
CAREY & KERR,
1410 Yeon Building,
Portland, Oregon,
G. C. FULTON,
Astoria, Oregon.
Attorneys for Appellee.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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STATEMENT OF THE CASE

The case, stripped to its essentials, is this: Oregon Pacific Mill and Lumber Company, a Nevada corporation, was organized November 28, 1917, to cut airplane spruce in Clatsop County, Oregon, for the Government during the war. On December 22, 1917, this corporation made a contract with the Spruce Production Division of the Army to deliver ten million feet of airplane spruce at the rate of 560,000 feet a month, at a price of $105.00 a thousand feet. This contract is known in this case as S. P. D.-4. It contemplated 18 months operations, the monthly rate of 560,000 feet, cutting out the full ten million feet in that period and bringing the contract to an end June

30, ~~1918~~ 1919. To carry out this contract the corporation bought from the Clatsop Mill Company a sawmill at Astoria and certain spruce timber lands. In order to finance its operations, the corporation borrowed from defendant Clem Rogers from time to time various sums totaling $345,000.00. To protect himself in making these advances defendant Rogers on January 8, 1918, made a written contract with Oregon Pacific Mill and Lumber Company, the borrower, in substance as follows:

(1) The corporation conveyed and assigned to Rogers all of its property including the sawmill at Astoria, timber lands, and "in particular all contracts with the Government of the United States, and all interest arising under such contracts" as security for the loans.

(2) Rogers was made general manager and treasurer of the corporation, with a proviso that he would keep his hands off as long as his loans were repaid him in instalments as agreed and the business run satisfactorily.

(3) The corporation was to repay him in instalments of $20,000.00 a month with 8% interest, and was to pay him 20% of the net profits. (He later gave up his claim to the profits in consideration for 1251 shares of the capital stock.)

(4) The corporation was to pledge to him 1250 shares of the capital stock; and

(5) The stockholders agreed to pay into the treasury for working capital the sum of $100,000.00 not later than March 5, 1918. (Record, pp. 116-123.)

Rogers carried out his part of this contract and made the advances totaling $345,000.00, but the Oregon Pacific Mill and Lumber Company did not carry out its part; it did not repay the instalments as agreed, nor put up the $100,000.00 working capital. The sawmilling operations of the corporation were in charge of two gentlemen named Corbaley and McDonald. These men were incompetent and the operations were thoroughly unsatisfactory to Rogers and to the Spruce Production Division of the Army, which was not getting airplane spruce deliveries under the contract in the quantities specified. A Mr. Dohrman, president of the company, and Rogers, its "angel," lived in San Francisco. They made trips to Portland to investigate, and, if possible, improve conditions, and Rogers, who was getting exasperated at the nonpayment of his loans and the failure of the stockholders to put up the agreed working capital, threatened to take over the property, but was mollified by promises of improvement, which did not materialize. Things went from bad to worse. The government was dissatisfied, and Dohrman feared that he or his company might be held legally liable for their failure to perform the Spruce Production contract; Rogers was thoroughly dissatisfied with the way things had gone; and therefore, with the consent of everybody, Rogers

exercised his rights under the contract of January 8, 1918, and took over as actual owner the sawmill and timber lands of the Oregon Pacific Mill and Lumber Company and allowed the company therefor a credit of $246,312.15, which was, with certain appropriate deductions, the same amount that the Oregon Pacific Mill and Lumber Company had paid for these properties out of the moneys Rogers had advanced to it. Rogers also at this same time bought the company's lumber stock in the sawmill yard allowing them a credit therefor of $59,834.95, which events proved to be quite an excessive price. All of this was authorized by a directors' meeting of the Oregon Pacific Mill and Lumber Company of September 24, 1918, and ratified by a stockholders' meeting of October 18, 1918. Rogers seems to have gone into actual possession about October 1, 1918. In taking over these properties he did not take over the whole business of the Oregon Pacific Mill and Lumber Company; he did not take over the cash, the book accounts, or the bills receivable, amounting in round numbers to $91,000.00. He did, however, as secretary and treasurer of that company, liquidate the company's affairs in so far as its assets would pay off its liabilities. These assets were, however, not sufficient to pay off all creditors in full, although he had expected them to be sufficient to pay everybody except himself and Dohrman. As it was, however, Brix Bros. Logging Company, this plaintiff, one of the creditors, was unpaid to the extent of fourteen thousand odd dollars, Dohrman was unpaid to the extent of over

$8,000.00, and Rogers was unpaid to the extent of over $31,000.00.

When Rogers took over these properties, as has been described, he operated them as sole trader under the name of Clatsop County Lumber Company. At the earnest solicitation of Dohrman (Record, p. 133), and, being especially authorized thereunto by the stockholders' meeting of October 8th (p. 132), Rogers secured the cancellation by the Spruce Production Division of the Oregon Pacific Mill and Lumber Company's contract No. SPD-4 (p. 114). He then made a new contract in his own name with the Spruce Production Division to furnish 6,200,000 feet of airplane spruce lumber at prices set forth in the contract (pp. 107-115). This contract is known as SPD-261. It was to run for the unexpired term of the old contract, expiring, as the old one would have, on June 30, ~~1918~~ 1919; and apparently the 6,200,000 feet was the amount undelivered under the old contract, though this does not definitely appear. This contract did not carry a cancellation clause allowing the government to cancel at will. Rogers proceeded to install a new manager, Mr. Brown, at the mill in place of Corbaley and McDonald, who had got out, and began to operate under his contract at a profit—his profit for the one month and twelve days that he operated up to the time of the armistice being $8,053.50, as contrasted with a net profit of $19,691.02 for the previous ten months' operation by the Oregon Pacific Mill and Lumber Company (p. 69. See, also, the findings of

the Contract Board of the Spruce Production Corporation, p. 101).

When the armistice came Rogers' contract SPD-261 was canceled by the Government and he was requested to present his claims to the Contract Board of the Spruce Production Corporation (successor to the Spruce Production Division). He did so in the form shown in Plaintiff's Exhibit 2 (pp. 47-50), which claim was evidently supported by Plaintiff's Exhibits 3, 4 and 5 (pp. 50-88). The claim as thus presented was a combined claim of Rogers as assignee of the Oregon Pacific Mill and Lumber Company and of Rogers in his own right; and he has explained that he presented it in this form at the request of the Spruce Production Division itself (p. 135); which is borne out in the opening statement of the claim that "the claim *in this form* is presented at the request of the United States Spruce Production Corporation as a basis of settlement, and the claimant reserves all legal rights." (p. 47.) Rogers presented the claim as assignee of the Oregon Pacific Mill and Lumber Company in so far as contract SPD-4 went, and in his own right in respect to contract SPD-261.

The Contract Board of the Spruce Production Corporation, (so Rogers and Brown both testified, pp. 134-136, and their testimony is nowhere contradicted), refused to listen to any claim whatever based on contract SPD-4 because that contract had been canceled at the special request of Rogers' assignor, the Oregon Pacific Mill and Lumber Com-

pany. Rogers, after some negotiation with the Board, finally agreed to accept $60,000.00 in settlement of his claim, and to sign a full release. The Contract Board made findings embodying the result of its deliberations (Plaintiff's Exhibit 7, p. 99), and the release signed by Rogers is Plaintiff's Exhibit No. 9 (p. 105). Rogers has always considered that this $60,000.00 belonged to him as damages for the cancellation of his contract SPD-261, and has treated the money accordingly. The Oregon Pacific Mill and Lumber Company has never made any claim for any part of this money.

The plaintiff in this case, Brix Bros. Logging Company, having sold logs to the Oregon Pacific Mill and Lumber Company during the days of its operations, and not having been paid in full for such logs, brought an action at law in the circuit court of the State of Oregon for Clatsop County against the Oregon Pacific Mill and Lumber Company in which it obtained a judgment by default in the sum of $15,-864.97 and $22.50 costs. On this judgment the sum of $1,133.46 was paid, leaving unpaid thereon $14,-754.01, with interest at the rate of 6% per annum from August 29, 1919, until paid.

The sheriff of Clatsop County making return that he was unable to find any property of the Oregon Pacific Mill and Lumber Company to seize in satisfaction of this judgment, the plaintiff Brix. Bros. Logging Company brought this suit in equity against Clem Rogers on the theory that he had improperly appropriated assets of the Oregon Pacific Mill and

Lumber Company to himself, and asking for an accounting, and that the assignments and transfers of the property of the Oregon Pacific Mill and Lumber Company to him be set aside as fraudulent, and that he be decreed to pay the plaintiff the amount of its said judgment.

The case has resolved itself into this issue of fact —does the $60,000.00 awarded by the Spruce Production Division in settlement of Rogers' claims belong to him or the Oregon Pacific Mill and Lumber Company, or if it belongs to both of them, in what proportion should it be divided? We contend it all belongs to Rogers. Appellee apparently contends that at least enough of it belongs to the Oregon Pacific Mill and Lumber Company to warrant plaintiff as a creditor of that company having its judgment paid out of such moneys. It will have to be borne in mind all the time that even if it be considered that the full $60,000.00 was awarded, contrary to our contention, for cancellation of contract SPD-4, nevertheless $31,000.00 of it would have to go to Rogers before any creditors of the Oregon Pacific Mill and Lumber Company could participate; because that amount was still owing from the Oregon Pacific Mill and Lumber Company to Rogers and was secured to him by the Oregon Pacific Mill and Lumber Company assigning to him all its rights and interests in Government contracts. This assignment, you will remember, was made in the contract of January 8, 1918, already referred to and was one of the considerations for Rogers' advances. So that, even under any theory of

the case most adverse to us, there is only $29,000.00 left to dispute about, and the question is—Is the plaintiff entitled to any portion of this sum?

In its first amended answer defendant suggested that the bill of complaint was defective because it failed to join Oregon Pacific Mill and Lumber Company as a party defendant (p. 16), and again made the same objection in open court before the case proceeded to trial (p. 46). The court overruled the objection, proceeded to hear the evidence, and gave a decree in favor of the plaintiff. The court's opinion says: "The question for decision is whether the defendant should be allowed to retain and apply to his own use the amount received by him from the Government over and above that due him from the corporation, or whether it shall be applied on plaintiff's judgment," and makes no attempt whatever to apportion the $60,000.00 between contracts SPD-4 and SPD-261. The court was evidently of the opinion that even if $31,000.00 of the $60,000.00 be considered as awarded for contract SPD-4, and in turn paid over to Rogers on account of his secured advances, there was still enough additional of the $60,000.00 awarded for contract SPD-4 to warrant paying plaintiff's judgment out of this additional amount. All of which seems to us the very plainest error. In our view, the whole $60,000.00 belongs to Rogers as an individual, and the Oregon Pacific Mill and Lumber Company still owes him $31,000.00, and the plaintiff with its judgment is merely unfortunate.

Defendant petitioned the lower court for a rehearing, and offered to produce Cameron Squires, a member of the Contract Board, and himself the writer of the Board's findings on Rogers' claim, who would testify that the board in awarding $60,000.00 had intended the full sum to go to Rogers in his own right. This petition the court denied.

SPECIFICATIONS OF ERROR

I.

The court erred in finding that any part of the $60,000.00 paid by the Spruce Production Corporation to Rogers in return for his release belonged to Oregon Pacific Mill and Lumber Company.

II.

The court erred in holding that any part of the $60,000.00 so awarded could be appropriated to the satisfaction of plaintiff's judgment against the Oregon Pacific Mill and Lumber Company.

III.

The court erred in holding, in effect, that none of said $60,000.00 was awarded to Rogers in his own right for cancellation of contract SPD-261.

IV.

The court erred in overruling defendant's objection that Oregon Pacific Mill and Lumber Company was a necessary and indispensable party defendant in this suit.

V.

The court erred in entering a decree in favor of plaintiff and against defendant.

ARGUMENT

On the Facts

The case does not require much argument; merely to state it is to argue it. I really feel, however, that an overconfidence in the outcome of the trial resulted in an imperfect presentation of the case to Judge Bean. Things seemed so evident to me that they were not pressed upon Judge Bean as vigorously as they might have been, which was hardly fair to him. I do not intend to be guilty of the same mistake with your Honors, and therefore will make this argument, but try to keep it brief.

Contract SPD-4 had been Voluntarily Cancelled at the Request of the Oregon Pacific Mill and Lumber Company.

This fact alone is, it seems to me, sufficient to destroy the theory that any part of the $60,000.00 awarded by the Spruce Production Corporation in settlement of Rogers' claims could be apportioned to this contract. Your Honors will remember that Mr. Dohrman, president of the Oregon Pacific Mill and Lumber Company, had been nervous about the possibility of the Government trying to hold him or his company liable for their failures under the contract. He therefore asked Rogers when Rogers was preparing to take over the property, to get the Government to cancel that contract, and the Oregon Pacific Mill

and Lumber Company itself made the same request. The Spruce Production officers, disgusted with McDonald and Corbaley's conduct of operations, were willing enough to cancel the contract and to make a new contract with Rogers himself, rightly thinking that he was a more reliable man with whom to deal and that they could expect deliveries from him under his new contract. And so the new contract SPD-261 contained a clause canceling contract SPD-4 (Record, p. 114). The cancellation was effective as of September 30, 1918.

The only claims that the Contract Board was considering were claims arising out of the cancellation by the Government, due to the armistice, of *existing* contracts. It is, therefore, frankly inconceivable to me how the Contract Board could have awarded any part of the $60,000.00 for the cancellation of contract SPD-4, which had been voluntarily cancelled a month and twelve days before the armistice *at the request of the assignor of the party making the claim.* It seems to me that the Government officials would have been derelict in their duty to have allowed a single penny on that contract. And the record here is conclusive that they took this same view of it. Both Rogers and Brown testified that the Contract Board refused to listen to any claim based on contract SPD-4 because it had been voluntarily cancelled at the request of the other party, and their testimony is uncontradicted (pp. 134-135). This is further corroborated by the findings of the Contract Board itself

(Plaintiff's Exhibit No. 7, Record p. 99), wherein, on pages 101 to 103, the Board says, in substance, that it cannot consider a claim based on the first contract because that had been an unprofitable and losing contract under the mismanagement of Mr. Corbaley; but that the Board recognized that under the second contract the mill was producing lumber at a profit due to the efficient management of the new manager, Mr. Brown, and that this contract did not have a cancellation clause attached, and therefore Rogers' claim under it would have to be considered (p. 101). For the convenience of the court I here set out the language I refer to.

> "The Board does not recognize the entire claim of Mr. Rogers because of the fact that his mill was operating at a loss while under the direction of Mr. Corbaley and the Board cannot consistently recommend consideration of repayment of losses sustained by reason of one individual permitting his affairs to be managed by another individual, when the second individual through his own negligence causes such losses. On the other hand, the Board recognizes the fact that there is still an open contract for the delivery of 4,400,000 feet of airplane spruce lumber without a cancellation clause attached and upon which claimant can rest his claim, especially in view of the fact that during the last couple of months the operation of this mill under the new manager, Mr. Brown, it is evident that the mill was producing lumber at a profit."

I do not know how you could have stronger evidence from the Board itself as to what contract they were making an award on. They say they do "not recognize the *entire* claim of Mr. Rogers" because under the first contract he was losing money and it was his own fault because the loss was due to his inefficient manager, Corbaley. But "on the other hand, the Board recognizes the fact that there is *still an open contract* for the delivery of 4,400,000 feet of airplane spruce lumber *without a cancellation clause attached* and upon which *claimant can rest his claim*," especially in view of the fact that under the new contract and new management the mill was showing a profit. It was plain that the Board thought that it was only on the new contract SPD-261 that Rogers could *"rest his claim."*

The computation which the Board made showing a net loss of $48,720.00 (par. 6 of their findings, pp. 102-103), shows the same thing—that they were awarding on the second contract only; but I reserve for a moment further explanation of this in order to first comment on a portion of Judge Bean's opinion.

Judge Bean's Opinion

Judge Bean says, in part (Record, pp. 18-19):

> "The question for decision is whether the defendant shall be allowed to retain and apply to his own use the amount received by him from the Government over and above that due him from the corporation, or whether it shall be applied on plaintiff's judgment.

"For the defendant the contention is that the payment made to him by the Government was for damages which he alone suffered by reason of the cancellation of the contract of October 8, 1918. But that contract was, in effect, a mere substitution for, or continuation of the former contract with the corporation because he had succeeded to the rights, obligations and property of the corporation, and was conducting the business formerly engaged in by it. It called for deliveries within the period prescribed in the original contract and in the same quantities monthly. The aggregate amount to be delivered is probably (although there is no evidence on that point) the quantity remaining undelivered by the corporation.

"The claim for damages as presented to the Government by the defendant, although made in his own right and as assignee of the corporation, supports this theory. It is based entirely upon the original contract with the Government, the finanical transactions of the corporation and its dealings with the Government and claims reimbursement on account thereof. The second contract is not mentioned or referred to therein." (This last sentence is erroneous.)

"The statement submitted in support of the claim is to the same effect, and the principal evidence offered is a report of certified accountants made up from the books and accounts of the corporation. It is upon this theory that the claim

was considered and allowed by the Contract Board of the Spruce Production Corporation, which in its findings recites the history of the transactions from the making of the contract with the corporation in December, 1917, to the refusal of the Government to accept further deliveries, and based thereon recommended the allowance.

"I conclude, therefore, that plaintiff is entitled to the relief as prayed for and decree may be prepared accordingly."

Now, even on Judge Bean's theory, as expressed in this opinion, Rogers alone is entitled to all the money. As a matter of fact, even if the second contract was, as Judge Bean says, a mere substitution for the first contract, it was nevertheless legally a new and separate contract, and the only contract on which Rogers could "rest his claim." In the language of the release executed by Rogers and drafted by the Spruce Production attorneys, it had "superseded" contract No. SPD-4. But be this as it may, it is not very material. For, even accepting Judge Bean's theory that the second contract was a mere substitution for, or a continuation of the first, still all the money would go to Rogers. To prove that I am right, I ask your Honors to study carefully paragraph 6 of the Contract Board's findings (Record, pp. 102-103). Here it is:

"The Board in attempting to arrive at a basis of settlement which does not include the consideration of estimated profits, but which would

seem fair and acceptable to the claimant as well as the Division, has made computation as follows:

Original investment	$278,000.00
Improvements	60,000.00
	$338,000.00

"(On account of the fact that the contract should have been 56% completed, there should have been written off 56% of $338,000.00, leaving a balance to be assumed as a portion of this claim.)

To be claimed	$148,720.00
Less salvage value	100,000.00
NET LOSS	$ 48,720.00"

In this computation the Board is considering the operation under the two contracts as one. When it says that "on account of the fact that the contract should have been 56% completed," etc., it uses the words "the contract" to cover the whole 18 months' operation. The "56%" is the equivalent of ten-eighteenths. Why ten-eighteenths? Because the original contract was to have run for 18 months. It was dated December 22, 1917, but operations under it were to commence January 1, 1918 (Record, p. 90), and at the rate of cut specified—560,000 feet a month until ten million feet were delivered—would have expired June 30, 1919, a period of 18 months. The second contract, SPD-261, took up the operations

where the first contract left off, October 1, 1918 (p. 114), and was to run for the unexpired time of the first contract, namely, to June 30, 1919. (Record, p. 108). In short, viewing both contracts as one operation, that operation would have terminated at the end of 18 months, and at that time the sum invested in the sawmill and timber properties, etc., namely, $338,000.00, would have been amortized. But this amortization period was cut short by the armistice. Only ten months of it had run, namely, nine months, or until September 30, 1918, under contract SPD-4, and one more month—October—and a few days in November, under contract SPD-261. Therefore, the Board said that if operations had been properly conducted, ten-eighteenths of the amortization would have taken place, leaving only eight-eighteenths which the Board could consider as a valid claim. This is what the Board means when it says in the findings, "(On account of the fact that the contract should have been 56% completed, there should have been written off 56% of $338,000.00, leaving a balance to be assumed as a portion of this claim.)

To be claimed	$148,720.00
Less salvage value	100,000.00
NET LOSS	$ 48,720.00"

In short, ten-eighteenths equal 55⅝%, which the Board for convenience called 56%, and 56% of the investment of $338,000.00 the Board considered should have been amortized in the ten months' opera-

tions, and therefore could not be considered. But there remained 44% which could be considered, and 44% is exactly $148,720.00—the figure that the Board arrived at and from which it then deducted the salvage value, leaving a net loss of $48,720.00. From this it is as plain as day that the Contract Board considered that the Oregon Pacific Mill and Lumber Company in the nine months' operation it had had under contract SPD-4 had wasted its opportunities to amortize its investment at a monthly rate which would make the amortization complete at the end of eighteen months, when the contract would have expired. And it is equally plain that the Contract Board considered that Rogers in the eight months of operation yet remaining to him under his new contract SPD-261 should have had the right to amortize his investment at this same monthly rate; and since he was being deprived of this opportunity by the cancellation of the contract consequent on the armistice, he should be made an allowance, to the extent of this amortization which he was being deprived of.

Remember that from the first of these operations until the end of them, it was Rogers' money which was financing them. First it was his money in the shape of advances; later it was his money in the shape of an actual investment. For, when he took over the properties about October 1, 1918, he allowed the Oregon Pacific Mill and Lumber Company proper credits for the value of the property and his money heretofore sunk in the venture as advances became invested. And it was to give him a little of this back

that the Board made its award. Incidentally, it may be remarked here that the only working capital ever provided by the stockholders of the Oregon Pacific Mill and Lumber Company amounted to about $40,000.00. All the rest of the money was Rogers. (Record, p. 126.)

Judge Bean, in the portion of his opinion quoted, mentions the fact that Rogers' claim and the statements submitted in support of it proceed on the theory that the second contract was a mere substitution of the first and the whole operation was one transaction. Frankly, in view of what I have written above, I cannot see what particular bearing this has on the case. However the claim was presented, the Contract Board made it plain that they were objecting to any claim on the first contract and Rogers accepted the $60,000.00 in settlement with the clear understanding that it was all for himself on the second contract. If, however, the manner in which the claim was presented has any bearing on the case at all, it is just as well to remember that the claim was presented in that form at the request of the Spruce Production Corporation which, very properly, wanted to get every conceivable claim before it. (Record, p. 135 and p. 47, where this fact is stated in the claim itself.)

As to the auditor's statement in support of the claim, this was filed by Rogers at the request of McDonald. (P. 135.) Note that the total claim as filed was for $193,891.21. (Record, p. 50.) But this

sum was cut down when the Contract Board discarded all claims on the first contract.

It is true, of course, that the final paragraph in the Contract Board's findings recommends that Rogers be reimbursed in the sum of $60,000.00 in full and final settlement of all claims growing out of "cancellation of contracts SPD-4 and SPD-261, it being understood and agreed that this settlement covers all claims of claimant Clem Rogers, the Oregon Pacific Mill and Lumber Company and the Clatsop County Lumber Company." It is also true that the waiver or acceptance of the Board's award which Rogers signed (Record, p. 104), says that he agrees to accept the $60,000.00 in full satisfaction of all claims "in any way growing out of our contracts SPD-4 and SPD-261, or as represented by our claim No. 44, heretofore filed with the Contract Board." Likewise, it is true that the release (Record, p. 105) mentions both contracts, and, on page 106, specifically releases all claims "growing out of or based on the above mentioned contract No. SPD-261 and No. SPD-4, or otherwise." But all of this is merely the usual precautionary language of an attorney who, in effecting a settlement, embraces all possible claims under it. These papers were all drafted by the Spruce Production Corporation lawyers, and since Rogers had presented a claim on both contracts, it was, of course, eminently proper that the lawyers should use language showing that he released all claims under both contracts. But this does not mean that any of the money was paid to him for account of the Oregon Pacific Mill and Lumber

Company on contract SPD-4. In fact, in the release the same caution to embrace all possible claims is evidenced throughout, where the release says (p. 106), that Rogers "releases the United States and the said United States Spruce Production Corporation from all liability, claim or demand whatsoever which said contractor may have or claim to have, whether now existing or hereinafter arising, growing out of the aforesaid contract or its cancellation or in any manner based thereon, as well as all claims or demands of every kind and character whatsoever arising out of or in connection with any operations of the contractor or dealings of any kind had between the contractor and the Government or the United States Spruce Production Corporation, or either of them, and its or their officers, agents or representatives." In short, Rogers, like any poor devil begging a settlement at the hands of the Government, was ready to release his rights to Paradise, but he was only being paid for one thing—his own losses in the cancellation of Contract SPD-261. The release, for all its all-embracing character, makes it pretty plain which contract was especially being considered. It starts out (p. 105), that whereas Rogers, sole trader, etc., heretofore entered into a contract, "said contract being No. SPD-261 *superseding* Contract SPD-4;" and whereas, the Government has canceled "said contract"; and whereas, the contractor claims certain damages by reason of "such cancellation"; and "Whereas, said Contract Board has allowed said claim in the sum of $60,000.00, and the contractor has

agreed to accept said award in full settlement and satisfaction of all claims or rights against either the Government or said United States Spruce Production Corporation, arising out of *said contract.*" Then comes the releasing part already commented on.

Neither the Oregon Pacific Mill and Lumber Company, nor Mr. Dohrman, its President, and himself a Creditor of the Company, has ever made any Claim to any Portion of the $60,000.00.

I ask your Honors to consider the rather extraordinary procedure that was had in this case. Even if Rogers had got any money in this award which did not belong to him, it would not have been money belonging to this plaintiff; it would have been money belonging to the Oregon Pacific Mill and Lumber Company, of which company this plaintiff is merely a creditor. That the Oregon Pacific Mill and Lumber Company has never made the slightest demand on Rogers for any part of this money; that Mr. Dohrman, to whom the company still owes over $8,000.00, has never made any demand on Mr. Rogers for any part of this money; is pretty good evidence that certainly neither the company nor its officers ever considered that they had any right to a single penny of it. Yet Judge Bean has allowed a mere creditor—not even a preferred creditor—to come in, and, without even going through the formality of first asking the Oregon Pacific Mill and Lumber Company to sue Rogers, sue him and get a decree against him on the theory that part of this $60,000.00 should have gone to the Oregon Pacific Mill and Lumber Company, which, be it noted again, has never claimed any right

to it. I think it as extraordinary a procedure as a court has ever indulged in. For, even if part of this money did belong to the Oregon Pacific Mill and Lumber Company, why should this plaintiff, Brix Bros. Logging Company, be preferred to any other creditor? There are still numerous other creditors of this company who have never been paid. If Rogers has got some money which belongs to this company and should be distributed among its creditors, they at least ought to be called into court by some general creditors' suit against the corporation and the amount pro rated among them.

Even if it could be considered that some Portion of the $60,000.00 belonged to the Oregon Pacific Mill and Lumber Company by virtue of its Contract SPD-4, there is not a scintilla of evidence in the Record on which Judge Bean or this Court could make such Apportionment.

It is elementary that a plaintiff must prove his case. He can't ask a court to guess. And yet that is just what has been done in this suit. Without one iota of evidence before him as to how much, if any, of the $60,000.00 belonged to the Oregon Pacific Mill and Lumber Company, Judge Bean has decided that Rogers shall pay fifteen thousand-odd dollars of it to plaintiff.

In considering this point, it must be remembered, as I pointed out in the opening statement, that by the contract of January 8, 1918 (Defendant's Exhibit A, p. 116), the Oregon Pacific Mill and Lumber Company had assigned to Rogers as security for the advances which he was to make, "all contracts, rights, leases, titles and interest of every kind and character

and in particular all contracts with the Government of the United States, and all interests arising under such contracts." This, of course, included all rights to any moneys accruing under contract SPD-4, (which had already been executed). The company still owed Rogers at the time the Contract Board awarded the $60,000.00 (and, in fact, still owes him today), $31,000.00. (Record, p. 134.) So that, even if $31,000.00 of the $60,000.00 be considered as awarded on SPD-4, it is still the property of Rogers, because of the said assignment to him of all rights under that contract as security for his advances. This, therefore, leaves only $29,000.00 about which there can be any possible dispute. Judge Bean himself recognized this. (See his opinion, p. 18, where he says that the question for decision is whether the defendant shall be allowed to retain the amount received by him from the Government "over and above that due him from the corporation.")

Now, you can search the record in this case from cover to cover and you will not find the slightest evidence on which Judge Bean could say that $15,000.00 of this $29,000.00 should be apportioned to contract SPD-4 and so paid to plaintiff. In fact, the evidence is so strong that none of it should go to the plaintiff that I can only feel that I did not present the case properly to Judge Bean. Of course, as my argument up to this point shows, I think it is undoubted that all of the $60,000.00 should go to Rogers, solely by virtue of contract SPD-261, and the corporation still owes him $31,000.00. But suppose you guess at it—

and to guess is all you can do—and say that $31,000.00 of it should go to contract SPD-4. Very well, this is Rogers' by virtue of the assignment, and wipes out the corporation's debt to Rogers. But having thus awarded *more than half* of the $60,000.00 to the *unprofitable canceled* contract SPD-4, can you further bite into the $29,000.00 guessed at as belonging to the *profitable uncanceled* contract SPD-261? Is not your guess already far too little in allowing the $29,000.00 to the profitable uncanceled contract?

Furthermore, there is this to be noticed. The Contract Board first offered Rogers $48,720.00 (Record, p. 103), as already explained. This Rogers refused, and the Board then increased its offer by $11,280.00, making the total $60,000.00. The Board, as explained in its findings (pp. 101-103), felt justified in adding this $11,280.00 to its original offer because of the fact that the Board felt that the $100,000.00 salvage value considered in its computations was a "debatable" item, for the reason that the spruce timber tract of the Oregon Pacific Mill and Lumber Company had been commandeered by the Government and selective logging had there been carried on by Grant Smith-Porter Brothers under Government instructions, which had gutted this timber of its best trees and had not left a good commercial logging "show." In short, this $11,280.00 was added because of the damage thus done to the timber. But remember that Rogers had become the actual owner of both the sawmill and the timber, taking them over at the full purchase price which the Oregon Pacific Mill and

Lumber Company had originally paid for them (with appropriate deductions for property used up or sold off, insurance used up and taxes, and such like adjustments. Record, p. 133). So that Rogers, as the owner of this timber, was clearly the one entitled to any sum paid for damaging the timber. And since Rogers is the only possible rightful owner of this $11,280.00, the logical conclusion is that this sum must be deducted from the $29,000.00, leaving only $17,720.00 about which there can be any possible dispute. Surely that is a small enough sum (if any apportionment at all is to be made) to guess at as being attributable to contract SPD-261. But Judge Bean thought otherwise. For the process of elimination which I have gone through shows that it is only out of this $17,720.00 that Judge Bean could have given the plaintiff the $15,000.00 which he did give him.

To put it another way, Judge Bean in order to arrive at his decision, had to go through the following process of reasoning: $31,000.00 was awarded on contract SPD-4, but this belongs to Rogers by virtue of the assignment. In addition to this, however, there was at least $15,000.00 more awarded on contract SPD-4, and this can go to plaintiff. In short, Judge Bean decided that at least $46,000.00 out of the $60,000.00 should be apportioned to SPD-4. I have such a high regard for his ability as a judge that I can only feel that it must have been my fault in presenting the case carelessly.

ERROR IN JUDGE BEAN'S OPINION

Judge Bean (p. 19), speaking of Rogers' claim before the Contract Board, says: "The second contract is not mentioned or referred to therein." This is a palpable error, as a reading of the claim (Plaintiff's Exhibit 2) will show. The very first words of the claim are that Rogers presents it *"in his own right* and *as assignee* of the rights of the Oregon Pacific Mill and Lumber Company for reimbursement for damages suffered by reason of the breach and cancellation by the United States of *its contract* with claimant." Of course, he would not be presenting his claim "in his own right" unless he was talking about his own contract; nor would he have presented a claim for "cancellation" if he had not been talking about his own contract; and of course the words "its contract with claimant" refer to SPD-261.

ERRORS IN THE RECORD

(1) In the Index, page ii, the words "Plaintiff's Exhibit No. 9—Contract of C. W. Rogers for Sale and Delivery to the Government of Spruce Lumber, p. 105" are in error. The document set out at page 105 is Rogers' release.

(2) Pages 74 and 75 of the Record are plain error, the pages having evidently been transposed in some manner.

(3) On page 127, sixth line, the word "occasionally" should be "accordingly."

ARGUMENT ON THE LAW

This suit has several aspects. If it be considered a suit on the part of a creditor to recover funds misappropriated by an officer or director of the corporation, then the complaint is defective in three particulars.

In the first place, it is the defendant's contention that the Oregon Pacific Mill and Lumber Company is and was an indispensable party to the suit for these reasons: If any money was misappropriated by Mr. Rogers, that misappropriation was primarily a breach of his duty as an officer and director of the corporation and made him liable to it therefor. In justice to the defendant, when he had raised the objection in his answer, as was done here, the corporation should have been joined as a party defendant, in order that it too might be precluded by the suit instituted by the creditor from subjecting the defendant to further litigation upon the same claim. If, moreover, funds of the company were thus misappropriated, then the company very properly might be interested in seeing that the funds, if any, so misappropriated be distributed ratably among all its creditors.

In the case of *Cunningham v. Pell,* 5 Paige, 607, the plaintiff, a judgment creditor of the corporation, brought suit against its directors alone to recover from them the amount due upon his judgment, on the ground that they had misappropriated funds of the company.

Chancellor Walworth held that the demurrer to the complaint should be sustained, saying at page 613:

> "But it is a fatal objection to all the relief claimed by this bill, that the corporation is not made a party. This question was decided in the case of Robinson v. Smith, before referred to. Although that suit was brought by the stockholders, and this by a creditor of the corporation, the principle is the same in both cases. If this creditor could compel the defendants to account to him for the funds of the bank which have been abstracted by the Pells, the corporation, if in existence, might hereafter compel the defendants to account a second time to it. Although the corporation is located in another state, if it does not appear voluntarily it may be proceeded against as an absent defendant."

In the case of *Chester v. Halliard,* 36 N. J. Eq. 313, a suit was brought by various depositors of a savings bank against certain of its managers on behalf of themselves and such other depositors as might choose to join with them in the litigation seeking to recover the amount of their several deposits from the managers of the institution on two grounds, namely, fraud in misrepresentation as to the condition of the bank, which is not here pertinent, and secondly because the funds of the bank had been squandered by the defendants.

A demurrer to the bill having been interposed, the Court of Errors and Appeals, affirming the trial court's decision sustaining the demurrer on this ground, said at page 315:

> "The second ground of complaint stated in the bill is deficient not in form, but in substance. It consists in statements showing that the defendants, as directors of the funds of the bank so mismanaged its affairs that it became insolvent. The bank itself is not a party to the suit, and the consequence is the complainants have no standing in court on this part of their case. If the capital and assets of the corporation have been squandered and lost by the misconduct of its officers, it is the corporate body itself that primarily has been wronged, and reparation is due immediately to it and not to the depositors. The depositors are but creditors of the corporation, and the moneys in question are not their moneys. It is true that as the directors are alleged to be the delinquent parties who are sought to be charged with the liability to make good the losses in question, these depositors have a footing in court to such redress in this matter, but in such proceedings the corporation, or in case of its insolvency, its receiver, must be a party, for it is in right of such corporate body that such a course of law is alone to be vindicated. But I shall not further discuss this subject, for the decisions are uniformly opposed to the legal power of a member of the corporate body to bring a suit in his own right and in disconnection with

the company, for losses occasioned to the corporation by the misconduct of its officers, and the topic has so recently undergone examination by the supreme court in the case of *Conley v. Halsey,* 15 Vr. 111, decided at the last term of that court. This suit cannot be sustained against these defendants on this second ground, the same being thus essentially defective."

In Cook on Corporations (4th Edition) Section 738, in speaking of similar suits brought by stockholders, it is said:

"The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong which the corporation itself should have remedied. This rule is due to the fact that a similar possible suit by the corporation is thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others."

See also:

Porter v. Sabin, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110.

Lathrop, Shea & Henwood Company v. Byrne, 100 N. Y. S. 104.

Robinson v. Smith, 3 Paige 222, 233.

Davenport v. Dows, 18 Wallace, 626, 627.

Boyd v. Mutual Fire Association (Wisconsin, 1903), 94 N. W. 171, 172.

In the second place the complaint is defective in that it fails to allege, and the evidence is insufficient in that it fails to show, any demand upon the corporation made by the plaintiff before the institution of this suit that it sue to recover the sums converted, or to show any excuse for not so doing. The wrong is primarily to the corporation and any action brought by either a stockholder of a solvent corporation or by a creditor of an insolvent corporation is in the right of the corporation, where, as in this state, the officers and directors of a corporation are not trustees for creditors and the trust fund theory so-called is not adopted.

> "Neither the corporation nor its governing body, so long as it is a going concern, holds its property in trust for creditors. The officers or directors occupy a fiduciary relation, demanding care, vigilance, and good faith. If they violate their duty, they at once become responsible to the corporation. If they are guilty of misfeasance or malfeasance, the latter may at once bring an action at law to enforce such liability. If the corporation refuses to act, the stockholders before insolvency, and the creditors after insolvency, may enforce such liability in the right of the corporation, and not otherwise. Such right is not based entirely upon the relation of trusteeship sustained to the creditors, but rather upon the legal right of the corporation to compel them to make reparation for their wrong. The right of the creditor to enforce the rights of the corpora-

tion may be said to rest upon the so-called fiduciary relation which the officers sustain to the corporation and indirectly to them."

Boyd v. Mutual Fire Association (Wisconsin, 1903), 94 N. W. 171, 172.

"Generally, where there has been a waste or misapplication of the corporate funds, by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the corporation. But as this court never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant."

Robinson v. Smith, 3 Paige, 222, 233.
Porter v. Sabin, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110.
Busch v. Mary A. Riddle Co., 283 Fed. 443, 444.

Suits brought by creditors directly against officers of a corporation to recover funds of the corporation alleged to have been misappropriated by the defend-

ant officer are rare. They are, however, analogous to such suits by stockholders.

> "Creditors cannot themselves ordinarily maintain actions at law against the directors or other officers of a corporation to recover damages for conversion of its assets or loss by reason of misapplication thereof, or of negligence, since the injury is to the corporation. Generally it is held that the proper mode of enforcing the liability, if the creditor has the right to sue, is by a suit in equity *on behalf of all the creditors and to which the corporation itself is a party.*"
>
> Fletcher on Corporations, Section 2673.

> "Actions by creditors against corporate officers for wrongs primarily to the corporation itself are not common, except where the right to sue is created by statute and the common law liability of officers to the corporation or its stockholders cannot generally be enforced by creditors nor can the creditors sue as an individual under ordinary circumstances. Oftentimes, however, a statute creates a liability in favor of the creditors."
>
> Fletcher on Corporations, Section 2678.

The third defect is that this suit is brought by plaintiff, not in his representative capacity on behalf of all creditors, but for himself alone. The law is sufficiently indicated in the excerpts from decisions already given.

If this suit be considered, not one to recover from the defendant funds which he as an officer of the corporation has misappropriated, but rather a suit to set aside a fraudulent conveyance,—that is to set aside the assignment (not that of January 8, 1918, but the one made after the armistice) to the defendant of the claim of the corporation against the United States Spruce Production Corporation, the making of which is both alleged by the complaint and admitted by the answer,—then two objections are made; First, that the Oregon Pacific Mill and Lumber Company was still an indispensable party and it was incumbent upon the plaintiff to join the corporation as a party defendant when the defect in parties was specifically raised in the answer and also by objection at the outset of the trial; and secondly, that there was a failure both in the allegations of the complaint and in the evidence to show any fraudulent conveyance.

In *Gaylord v. Kelshaw,* 1 Wall. 81, 17 L. Ed. 612, the plaintiffs as judgment creditors of the defendant Kelshaw brought a suit in the Federal Circuit Court to set aside an alleged fraudulent conveyance of land from Kelshaw to Butterworth.

The plaintiffs were alleged to be citizens of Ohio, while defendant Butterworth was alleged to be a citizen of Indiana. The complaint was silent as to the citizenship of the defendant Kelshaw. In the absence of a showing on the face of the bill or in the record of the citizenship of the defendant Kelshaw,

the question of the Federal Court's jurisdiction was thus discussed by the Supreme Court. The court said:

"It is clear, that neither the court below, nor this court, has jurisdiction of the case as between plaintiffs and Kelshaw.

"But as the court might, under some circumstances, proceed to adjudicate on the rights of the parties properly before it, we must look into the case, so far as to see if it is one in which relief may be decreed, as between plaintiffs and Butterworth, without regard to Kelshaw.

"Without referring to the numerous cases in this court and others, on the necessity of having all the proper parties before the court, in a suit in equity, and the circumstances under which the court will proceed in some cases, without persons who might well be made parties, it is sufficient to say that, in the present case, we think Kelshaw is properly made a defendant to this suit. It is a debt which he owes which is sought to be collected. It is his insolvency which is to be established, and it is his fraudulent conduct that requires investigation.

"If the conveyance to Butterworth shall be decreed to be set aside, and the property conveyed to him, subjected to the payment of plaintiffs' debt, it is proper that Kelshaw should be bound by the decree; and to that end he ought to be a party."

In *Swan Land & Cattle Co. v. Frank,* 148 U. S. 603: 37 L. Ed. 577, 580, in speaking of the case of

Gaylords v. Kelshaw, supra, it was said that in that case,

> "It was held by this court that in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant, because it was his debts that were sought to be collected, and his fraudulent conduct that required investigation."

See also

Beswick v. Dorris, 174 Fed. 502, 508.

That the evidence is insufficient to make out a case of fraudulent conveyance under the laws of Oregon seems obvious, for the circumstances surrounding the assignment of the company's claim against the United States Spruce Production Corporation have none of the usual indicia of fraud. There is absolutely nothing in the record to show either that the assignment was made to hinder, delay or defraud creditors of the corporation or that Mr. Rogers took the assignment with knowledge or notice of any such intention on the part of the corporation, or with any such purpose himself. As a matter of fact, the sole and uncontradicted evidence upon the point is that of Mr. Rogers to the effect that he took the assignment not absolutely as would be the case in a fraudulent conveyance, but simply to accommodate the company and to facilitate the filing of its claim with the Claims Board of the Spruce Production Corporation.

Under these circumstances, it is submitted that plaintiff has quite failed to show either a misappro-

priation of the assets of the corporation by one of its officers or anything even faintly resembling a fraudulent conveyance. The most that can be claimed upon the record is that for purposes of collection only the Oregon Pacific Mill and Lumber Company assigned to Mr. Rogers and that Mr. Rogers received some money upon a claim against the Spruce Production Corporation, which he filed upon his own behalf and as assignee of the company's claim. And the facts in this regard we have already discussed.

If none of the money received by Mr. Rogers was paid him on account of the assigned claim of the corporation, then obviously this suit must fail; if on the other hand Mr. Rogers did receive anything either as trustee or as agent for the Oregon Pacific Mill and Lumber Company, then he became obligated to pay any moneys so received directly to the corporation. The legal question then is not one of fraudulent conveyance, nor one of misappropriation of funds by a corporate officer, but rather whether a mere judgment creditor of a corporation, suing not for all creditors of the company but for himself alone, may maintain a suit directly against a debtor of or trustee for the corporation without joining the corporation as a party plaintiff or defendant, without alleging or proving a demand made upon the corporation that it bring such a suit, and without, in lieu thereof, alleging or proving any facts excusing such demand.

A receiver of a corporation would have power to enforce such obligations in the derivative right of the company; and some courts would doubtless allow a

creditor, suing for all creditors similarly situated, to enforce them, if the corporation or its receiver refused to do so. We have, however, been able to find not a single precedent for such a suit as this is, and it is earnestly submitted that such a suit cannot be maintained. If it can be, then one who is unfortunate enough to be the debtor of an insolvent corporation is liable to as many separate suits as there are creditors of the insolvent corporation, each creditor suing the debtor not on behalf of the corporation and all those interested in it but for himself alone. We do not believe that the law contemplates any such wild scramble on the part of the creditors of an insolvent corporation and that the absence of such cases in the books is good evidence that such suits are not maintainable.

Respectfully submitted,

Erskine Wood,
M. M. Matthiessen,
Attorneys for Appellant.